88-1125

No. 88-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM Z. PENTELOVITCH, ESQ.
BECKY PALMER, ESQ.
CHARLES HOFFMAN, ESQ.
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, Minnesota 55402
(612) 339-8015

Attorneys for Petitioner
Planned Parenthood of Minnesota

JANET BENSHOOF
(Counsel of Record)
RACHAEL PINE
LYNN PALTROW
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

LINDA OJALA, ESQ.
KURZMAN, GRANT & OJALA
2445 Park Avenue South
Minneapolis, Minnesota 55404
(612) 871-9004

Attorneys for Petitioners
Other Than Planned
Parenthood of Minnesota

QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred in holding constitutional a requirement that both biological parents be notified prior to a minor's abortion, regardless of whether they had ever married, or were separated or divorced, unless the minor obtained an order from a state court.

2. Whether the Eighth Circuit erred in holding that the imposition of a mandatory 48-hour waiting period, after constructive notification to both parents, was constitutional.

3. Whether the Eighth Circuit erred in holding that *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), precludes invalidation of the Minnesota parental notification/judicial bypass statute as unconstitutional in its entirety, despite factual findings that after five years of operation it failed to promote any state interests, and, in fact, undermined family integrity, communication, and privacy interests for many minors.

4. Whether the Eighth Circuit erred in holding that the statute is consistent with the equal protection clause of the United States Constitution.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases PAGE

Federal Rules

Statutes

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-_____

JANE HODGSON, M.D.; ARTHUR HOROWITZ, M.D.; NADINE T., JANET T., ELLEN Z., HEATHER P., MARY J., SHARON L., KATHY M., and JUDY M., individually and on behalf of all other persons similarly situated; DIANE P., SARAH L., and JACKIE H.; MEADOWBROOK WOMEN'S CLINIC, P.A., PLANNED PARENTHOOD OF MINNESOTA, a nonprofit Minnesota corporation; MIDWEST HEALTH CENTER FOR WOMEN, P.A., a nonprofit Minnesota corporation; WOMEN'S HEALTH CENTER OF DULUTH, P.A., a nonprofit Minnesota corporation,

Petitioners,

—v.—

THE STATE OF MINNESOTA; RUDY PERPICH, as Governor of the State of Minnesota; HUBERT H. HUMPHREY, III, as Attorney General of the State of Minnesota,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are those set forth in the caption on the cover of this petition.[1]

---

1 This caption differs from those used in the courts below. The lower courts erroneously failed to use the substituted caption entered by order of the district court on April 3, 1986. This order is reprinted in the Appendix submitted herewith. (6a-7a). Citations to the Appendix are made to the page number therein as "(_____a)".

OPINIONS BELOW

The opinion of the district court was issued on November 6, 1986. It is reported at 648 F. Supp. 756 (D. Minn. 1986). (10a-52a).

A panel of the Eighth Circuit Court of Appeals issued its decision on August 27, 1987. The decision was set for publication at 827 F.2d 1191 (8th Cir. 1987), (53a-72a), but was subsequently withdrawn by the court. 835 F.2d 1545 (8th Cir. 1987). (158a-159a).

The en banc opinion of the Eighth Circuit Court of Appeals was issued on August 8, 1988. It is reported at 853 F.2d 1452 (8th Cir. 1988). (74a-109a).

JURISDICTION

Jurisdiction is proper pursuant to 28 U.S.C. § 1254(1), which provides for review by certiorari "upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATUTES INVOLVED

Minnesota Statutes Annotated § 144.343(1)-(7). (1a-4a).

STATEMENT OF THE CASE

I. HISTORY OF THE LEGISLATION.

In April, 1981, the Minnesota legislature enacted Minn. Laws 1981 Ch. 228, codified as Minn. Stat. Ann. § 144.343(1)-(7). (1a-4a).[2] Subdivision 2 of the statute provides that no abortion

2 The statute was an amendment to the Minors' Consent to Health Services Act, passed in 1971, which permits all minors to give effective consent for all medical, mental or other health services to treat pregnancy, venereal disease or drug abuse. § 144.343(1). (1a). The health professional is permitted to inform parents where failure to inform would jeopardize the minor's health. Minn. Stat. Ann. § 144.346. (5a).

may be performed upon an unemancipated minor until at least 48 hours after written notice to both parents. (1a-2a). Subdivision 6 provides that if the parental notification provision of subdivision 2 is ever judicially enjoined, the statute will then be enforced with a judicial bypass as an option to parental notification. (3a-4a). Under the judicial bypass provision, a minor may seek a state court order permitting her to obtain an abortion without notification to both parents if she can convince a judge that she is "mature and capable of giving informed consent" or that an abortion without notice to both parents would serve her "best interests." (3a).[3] Subdivision 5 subjects anyone performing an abortion in violation of the statute to criminal penalties and civil liability. (2a-3a).[4]

The asserted purpose of the statute is to foster intra-family communication and to protect pregnant minors by promoting parental involvement in the minor daughter's abortion decision, (57a), but, as found by the district court, the legislature also intended to create an obstacle that would prevent at least some minors from obtaining abortions. (25a).

II. HISTORY OF THE LITIGATION.

Plaintiffs[5] consist of a class of mature minors seeking abortions in Minnesota without the involvement of one or both of their parents, three divorced mothers who support their minor daughters' abortion decisions and fear notice to their ex-

3 The statute further provides for a guardian *ad litem* and an attorney to be appointed by the court, § 144.343(6)(c)(ii), (3a), for confidentiality and expedition in processing, § 144.343(6)(c)(iii), (4a), and for expedited appeal and for access to the trial courts 24 hours a day, seven days a week. § 144.343(6)(c)(iv). (4a).

4 The statutory exceptions to the two-parent notice requirement are as follows: 1) where the physician certifies the minor's life is endangered such that there is no time for notification, § 144.343(4)(a); 2) where written consent is given, § 144.343(4)(b); and 3) where the minor is a reported victim of sexual or physical abuse, § 144.343(4)(c). (2a).

5 Petitioners will be referred to as "plaintiffs" and respondents as "defendants."

husbands,[6] four medical clinics in Minnesota which together perform nearly all the abortions in the state, and two physicians who provide abortion services for their minor patients. Defendants are the State of Minnesota, its Governor and Attorney General. (11a-13a).

Plaintiffs challenged the statute on the ground that on its face and as applied it violated the equal protection and due process rights of minors under the United States and Minnesota Constitutions. (13a-14a). On July 31, 1981, a Temporary Restraining Order enjoining subdivision 2, requiring two parent notice without a bypass, was granted, but § 144.343(2)-(6) (two-parent notice with a judicial bypass procedure) was permitted to go into effect on August 1, 1981. (14a). On March 22, 1982 a preliminary injunction was issued as to subdivision 2 but denied as to subdivision 6. (14a). On January 23, 1985 the district court granted defendants' motion for summary judgment on their claim that subdivision 6 was constitutional on its face, but denied their claim that Minn. Stat. Ann. § 144.343(2)-(6) was constitutional as applied. *Id.* Trial commenced in February of 1986 after subdivision 6 of the statute had been in effect in Minnesota for approximately five years.

During the trial, which lasted five weeks, the federal district court heard from seventy-five witnesses, including the Minnesota state court judges who collectively had heard over ninety percent of all the judicial bypass petitions over the five years the statute had been in operation, public defenders, guardians *ad litem* for the minors, physicians and counselors whose medical care for the minors had been affected by the law, epidemiologists, experts in adolescent development and family communication, psychiatrists with clinical practices encompassing pregnant minors, twenty-four members of the minor class and four single parents or family members of pregnant minors.

The district court held that 1) subdivision 2, the notification requirement, standing alone, was facially invalid; 2) the notice/

6 The district court incorrectly refers to only one single parent plaintiff. Diane P., Sarah L., and Jackie H., all divorced mothers, were substituted for Lauren Z. by order of the district court on April 3, 1986. *See supra* note 1.

bypass requirement was facially invalid to the extent it required two-parent notification and a 48-hour waiting period instead of some shorter period; 3) the 48-hour waiting period, but not the two-parent requirement, was severable;[7] and 4) but for this Court's decision in *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983), the district court would have found the statute unconstitutional as applied in its entirety because it failed to serve the state's asserted interests. (57a-58a). The district court enjoined the entire statute because of the inseverability of the two-parent notification requirement. (51a).

On August 27, 1987, a panel of the Eighth Circuit affirmed the district court's decision. The panel, accepting the district court's findings of fact, agreed that 1) subdivision 2 (notification without a bypass option) was unconstitutional because a bypass option was required under the decisions of this Court, (62a); 2) compelling notice to both biological parents without exception was "almost always disastrous" to minors and their families, (62a); and 3) the two-parent notification requirement was not severable from the remainder of the statute, (71a).[8] The panel specifically held that the two-parent requirement could not be saved by the presence of a judicial bypass system when "as in this case, the underlying notification requirement impermissibly burdens the minor's abortion decision." (68a).

On November 13, 1987, the panel granted defendants' request for rehearing by the panel, vacated and withdrew its prior opinion, held any further decision in abeyance pending a decision by the United States Supreme Court in *Hartigan v. Zbaraz*, ____ U.S. ____, 108 S. Ct. 479 (1987), and denied rehearing en banc as moot. (158a-159a).

7 Although there was no proof that the 48-hour waiting period in Minnesota facilitated any parent/child communication, the district court ruled that *H.L. v. Matheson*, 450 U.S. 398 (1981), precluded a holding that waiting periods are unconstitutional per se. Noting, however, that the waiting period, in practice, often extended far beyond 48 hours, the court invalidated the 48-hour waiting period as excessively burdensome and severed it from the statute. (50a).

8 The panel did not reach the question of the constitutionality or severability of the mandatory 48-hour waiting period.

After an equally divided Supreme Court affirmed the decision of the Seventh Circuit without opinion in the *Zbaraz* case, the Eighth Circuit *sua sponte* granted the state's request for en banc review, setting oral argument before the court en banc for February 12, 1988. (160a). The en banc opinion was issued August 8, 1988. (74a).

The court en banc agreed with the district court and with the panel that Minnesota could not constitutionally require a minor to notify her parents of her intention to have an abortion without providing a judicial bypass option. (81a). The court also agreed with the panel that the district court's factual findings were not clearly erroneous. However, the court disagreed with the panel and with the lower court and found the facts to be immaterial based on a misimpression that the Supreme Court had previously considered such facts when upholding the facial validity of "similar statut[es]." (85a). In addition, the court found that a non-custodial parent's interest in being informed of his minor child's activities outweighed the minor's constitutional right to privacy. (92a-95a); *see also* (104a-105a) (Lay, C.J., dissenting).

The court found that the district court had erred in finding the two-parent notification requirement burdensome in the following respects: 1) the district court did not give enough weight to "parental and family interests," (92a-96a); 2) the district court gave too much weight to the 42% of minors who do not live with both biological parents, (91a-95a); and 3) the district court incorrectly considered the impact of the two-parent notification statute in isolation from the bypass system. (96a). For similar reasons the en banc opinion found the 48-hour delay requirement not to be a significant burden.

The Eighth Circuit granted a stay of the mandate on its en banc decision pending review by this Court. (110a-111a).

III. THE FACTUAL RECORD.

A. While in operation, Minnesota's criminal two-parent notification statute caused unnecessary psychological and physical harm to teenagers, reduced family communication, imposed substantial and dangerous delays, and undermined single-parent families.

Minn. Stat. Ann. § 144.343(2) requires that a minor seeking an abortion notify both biological parents, if they are living, unless the second one cannot be located through reasonably diligent effort. (1a). The statute makes no exception for a non-custodial parent who is divorced, separated, or never married, or for an absent parent who has never met the minor. (21a). No exception is made for the parent, custodial or not, whom the minor fears will react abusively to notification, unless the minor is willing to charge formally that parent with previous sexual or physical abuse. *Id.*

Upon reviewing the evidence of the actual impact of the Minnesota law over its five years of operation, the district court concluded that the statute had effected no increase in intra-family communication on the subject of pregnancy or abortion. (41a-42a). Specifically, the court found that a "sizable proportion of minors seeking an abortion in Minnesota voluntarily notif[ied] at least one parent" before the statute and that this proportion did not change after the statute took effect. (41a).

Based on the testimony of numerous experts at trial, the panel, agreeing with the district court, concluded that "although family relationships benefit from voluntary and open communication, compelling parental notice has an opposite effect . . . . [i]t is almost always disastrous." (62a); *see also* (21a-22a). Compelling notification to both parents, especially when they are divorced or separated, can be harmful to the child's welfare, as the district court found. (30a-31a).[9] In

9 "National statistics reveal that approximately [50%] of all marriages end in divorce. There [was] no testimony [at trial] indicating that the divorce rate in Minnesota differs from the national average. To the contrary, clinic experience indicates that only 50% of minors in the state of Minnesota reside

functional families, a non-custodial parent often reintegrates into the family in a disruptive manner, but in abusive, or dysfunctional families, compelled notification is especially dangerous. *Id.*[10] Notification of a non-custodial or absent parent in such families can provoke violent and abusive reactions. (31a). Dr. Lenore Walker, one of plaintiffs' expert witnesses, gave unrebutted testimony that pregnancy triggers violent reactions in abusive dysfunctional families "like a red cape to a bull." (141a).[11]

The court further found that compelled two-parent notification, in operation, inhibited voluntarily initiated intra-family communication in a large number of cases. (46a). Twenty to twenty-five percent of the minors who used the judicial bypass option had already notified one parent, and that parent often accompanied the minor to court. *Id.* The vast majority of these voluntarily informed parents were women such as the plaintiffs Diane P. and Sarah L., who were divorced and had not seen their husbands in years. (31a). The court found that compelling single mothers either to notify a disinterested or abusive non-custodial parent or to seek court authorization not to do so is traumatic, burdensome, interferes with voluntarily initiated

---

with both biological parents. This figure is corroborated by one study that found that 9% of minors in Minnesota live with neither parent, 33% live with only one parent and thus 42% do not live with both biological parents." (29a).

10 The district court found that a large percentage of families in Minnesota in particular and in the United States in general, are dysfunctional. Reports indicate that there are an average of 31,200 reported assaults on women by their partners each year in Minnesota alone, and that family violence occurs in two million families in the United States. (30a). Even these numbers substantially underestimate the problem because members of dysfunctional families are characteristically secretive about such matters and minors are particularly reluctant to reveal violence or abuse. *Id.* Whatever the actual numbers, the court found that "[m]any minors in Minnesota live in fear of violence by family members; many of them are in fact, victims of rape, incest, neglect, and violence." *Id.*

11 Studies of abusive dysfunctional families reveal that family violence is at its height during pregnancy, immediately following childbirth, and during adolescence. (140a-141a).

parent-child communication, and infringes upon the privacy of both mother and daughter. (46a-47a); *see also* (22a).[12]

The district court concluded that a "regulation requiring notification of both parents when the nuclear family is broken apart or never formed is not reasonably designed to further the State's interest in protecting pregnant minors." (46a). Moreover, in considering the statute as a whole, the court found that "five weeks of trial have produced no factual basis upon which this court can find that Minn. Stat. Ann. § 144.343(2)-(7) on the whole furthers in any meaningful way the state's interest in protecting pregnant minors or assuring family integrity," (41a), and that the statute failed to improve family relations "more than it undermine[d] them." (29a). For these reasons, the court concluded that the substantial burden imposed by § 144.343(2)-(7) "is not justified by the state's interests." (42a).[13]

B. The judicial bypass procedure, while assuring that some minors received the privacy critical to an abortion choice, increased medical risks and was so formidable an obstacle as to force teenage motherhood for some mature and best interest minors.

Minnesota's two-parent notification and judicial bypass mechanism went into effect on August 1, 1981. As of March, 1986, the time of trial, 3,573 petitions had been filed by minors, (23a), representing nearly one-half of all minors seeking abortions during that period.

---

12 For example, Jackie H., one of the three named single mother plaintiffs, testified at trial that while at state court with her daughter, seeking an order under this statute, she was forced to reveal, before her daughter, that her divorce had been based on physical abuse. (117a-118a).

13 Parental involvement requirements, with or without a judicial bypass system, cannot be sustained unless the state is able to prove that the statute is necessary, narrowly tailored, and actually serving state interests previously recognized as significant or compelling by this Court. *See H.L. v. Matheson*, 450 U.S. 388, 413 (1981); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1536-37 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987). *See generally infra*, Reasons For Granting The Writ.

The factual record shows that the judicial bypass provided an essential escape route for minors. Judges who had heard over ninety percent of these petitions testified at trial that the minors gave compelling, disturbing, and believable reasons in support of the necessity of privacy regarding their abortion. (114a-115a; 122a-124a). Some minors would have been forced to leave home if their parents had discovered that they were pregnant. (123a). Others feared physical and mental harassment by a father or stepfather, who in some cases may have been the father of the child they wished to abort. (115a; 122a; 123a-124a). Many said that notifying their parents of their pregnancy would only exacerbate an already stressful and strife-ridden family situation. (123a-124a). Some minors with parents who were severely ill or overly sensitive to stress felt that it would be in their parent(s)' best interest not to be informed. (114a; 122a; 124a). Whatever the particular reasons, these judges testified that, based on years of judicial experience, they found the minors to be truthful and indeed the best judges of the appropriate course of action under their own unique family circumstances. (114a-115a; 123a; 126a).

Although the district court found that there was not "a systemic failure to provide a judicial bypass" in the most expeditious manner, (18a), minors seeking to invoke the bypass option were inevitably delayed anywhere from two or three days to a total of one week or more in obtaining an abortion. (20a).[14] The court found these delays "unavoidable." (18a). The district court found that going to court produces "fear and tension" in minors, making them feel "guilty and ashamed." (20a). Some minors were so upset about the judicial procedure that they considered it more difficult than the abortion itself; their anxiety affected the medical procedure. *Id.*[15] The court found the judicial bypass so daunting to some teenagers that some mature and best interest minors carried unwanted pregnancies to term. *Id.*[16]

14 A minor must first call a clinic to learn of her options. After this the teenager who chooses to go to court must call to get an appointment. Some counties have no sitting judges. (19a). Class members Heather P. and Sharon L. had to wait two weeks and one and a half weeks respectively for abortions because of delay due to scheduling problems with the court. (115a; 124a). Two class members, Cynthia J. and Bonnie L., testified they were pushed into the second trimester by these added delays, (132a; 133a-134a); another was forced to go to Iowa with her mother because she didn't have time to await the conclusion of judiciary proceedings. (121a).

Finally, the time demands of the judicial procedure (several hours) threatened to compromise the minors' privacy as well as the medical care they received. Particularly for minors living outside of the two metropolitan areas,[17] travel time together with the time required for court proceedings made it nearly impossible to have the abortion and return home early enough to maintain privacy. (199a-120a). To accommodate these time pressures, physicians and counselors were sometimes compelled to cut short counseling sessions and other ancillary personal

15 Some minors coming from court to the clinic had to be given sedatives (which were not given before this law) because of the effect of the stress and pressure on their vital signs. (120a).

16 Between 1981 and 1984 the birth rate for teenagers 15-17 years old in the City of Minneapolis went up *35.8%*, (136a), compared to a rise in birthrate of *.3%* for 18-19 year olds, (137a), during the same period; these groups would normally be expected to share statistical trends. (112a). A representative of the Minneapolis Health Department attributed the disparity to the imposition of the parental notification law, which affects only minors 17 and under. (112a).

The social, psychological, economic and educational effects of teenage motherhood have been recognized by this Court. *Carey v. Population Services Int'l*, 431 U.S. 678, 696 n.21 (1977) (plurality). In terms of mortality, it is 20 times safer to have an early abortion than to carry to term, *see* LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 191 (1982); an abortion at any stage of pregnancy is safer than childbirth.

17 In Minnesota, no abortion providers are located in 82 out of 87 counties, (14a), virtually all abortion services are in the two metropolitan centers, Minneapolis/St. Paul and Duluth, (15a), and out of 87 private and public hospitals in Minnesota, only two hospitals are generally open for abortion services. (15a). Transportation problems force some women to drive seven hours to a clinic. (76a). Air or bus travel is difficult or non-existent in some cases. *Id.* Because the further a woman has to travel the less likely she is to get an abortion, (15a), there is a great unmet need for abortion services in Minnesota. (116a). In general, women in Minnesota get abortions later than in the United States as a whole. (16a).

and psychological support services which would ordinarily be available, (131a); some physicians were forced to use alternate medical procedures in order to accommodate the stresses and pressures added by the court process.[18]

C. The mandatory 48-hour waiting period was unnecessarily long and, in operation, combined with other factors to produce substantial and dangerous delays.

Minn. Stat. Ann. § 144.343(2) prohibits performing an abortion upon an unemancipated minor until at least 48 hours after written notice of the pending operation has been delivered to the minor's parents. (1a). The district court found that the "waiting period exceeds that necessary to allow parents to consult with minors contemplating abortion . . . [and] fails to further the State's interest in protecting pregnant minors." (32a).

Moreover, the court found that the waiting period, in operation, often caused much longer delays. If notice is mailed, constructive delivery occurs at noon on the next regular mailing day. Consequently, minors in Minnesota who choose to notify their parents by certified letter commonly must wait 72 hours between initiating the notification process and the abortion itself. (47a). The waiting period was further compounded by "scheduling factors such as clinic hours,[19] transportation

18 Plaintiff Dr. Jane Hodgson testified that although laminaria (a substance used to dilate the cervix) is often used only for second trimester patients, it was a better medical practice to use the substance with all teenagers. (118a-119a). To be effective, laminaria must be inserted several hours before the abortion procedure. (120a). This could not be done for her teenage patients in Duluth who travel far to get to court, do not get through court until midafternoon, and must have their abortion and return home the same day. (119a-120a). Dr. Hodgson was thus forced to choose between not using laminaria and not doing the procedure at all. (120a).

19 Because the Duluth Clinic is not open for abortions every day, mailed notice means a minor must often wait an entire week before the procedure can be performed, even when the minor has one parent's consent. (128a-129a).

requirements,[20] weather, a minor's school and work commitments, and sometimes a single parent's family and work commitments. In many cases, the effective length of the delay may reach a week or more." (22a-23a) (footnotes added).

The court found that delays of any length can increase the statistical risk of mortality and morbidity in performing an abortion. (23a). These delays forced some minors to have more expensive,[21] riskier[22] procedures, and the percentage of minors getting second trimester abortions increased.[23]

20 "In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interest in encouraging parental consultation, because a shorter period would effectuate that interest as completely." (49a).

21 A first trimester abortion averaged $225.00 (up to 12 weeks); a delay of even a few days raised this to $275.00 (12-14 weeks) for plaintiff minors. (16a). For teenagers in the Duluth area, the delay also meant the additional cost of overnight travel to Minneapolis where second trimester abortions are performed. (119a). There is no Medicaid funding for abortions in Minnesota. (120a). Some teenagers were forced to hitchhike in the winter, (120a), and some to sleep in their cars. (132a).

22 The district court found a one-week delay significantly increased medical risks. (20a).

23 Between 1978 and 1983 the percentage of minors obtaining second trimester abortions in Minnesota went from 18.4% to 23.0%, (135a), an increase of 26.5%. An official from the Minnesota Department of Health, testifying as the state's witness, agreed that these statistics presented a public health problem. (114a). Furthermore, there is evidence that this number is increasing. Meadowbrook Women's Clinic, which performs nearly all the second trimester abortions in the State, said as of December 1985, thirty percent of its minor patients seeking abortions were already in the second trimester. (130a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS ISSUES OF GRAVE PUBLIC IMPORTANCE BECAUSE CRIMINAL PARENTAL NOTICE AND CONSENT LAWS, SINGLING OUT ABORTION, HAVE A PROFOUND AND IRREPARABLE IMPACT ON MINORS NATIONWIDE.

A. Mandatory parental involvement laws have been widely and repeatedly enjoined since this Court's opinion in *Ashcroft*.

Criminal parental notice and consent laws singling out abortion are a catastrophe in the lives of pregnant minors and their families.[24] These laws present an exception to a trend in state laws assuring privacy for minors regarding pregnancy-related care, venereal disease, substance abuse and contraception. *See* Minn. Stat. Ann. § 144.343(1) (providing that any minor may give effective consent for medical or mental treatment for pregnancy, venereal disease and alcohol or drug abuse). (1a).[25] Despite this Court's previous decisions, the constitutionality of these statutes has remained a perennial question in the federal courts, as more and more states have singled out abortion for a requirement of notice or consent. At present, twenty-four states have parental notification or consent statutes which are either

24 A study of seventeen deaths following illegal abortions reported in the United States between 1975 and 1979 revealed that a "desire for secrecy was the primary reason four women sought illegal abortions and was a secondary factor for five others." One who died was a fifteen year old honor student at a Roman Catholic girls' school. She was found dead in the bathroom of her home, a plastic tube in her vagina. Binkin, Gold & Cates, *Illegal Abortion Deaths in the United States: Why Are They Still Occurring?*, 14 Family Planning Perspectives 163, 165 (May/June 1982).

25 *See generally* English, *Adolescent Health Care: Barriers to Access; Consent, Confidentiality, and Payment*, 20 Clearinghouse Review 481, 484-86 (Summer 1986). The necessity for privacy has been repeatedly recognized by the United States Congress. For example, under Title X, minors must be given access to contraception without parental consent. *See Planned Parenthood Fed'n of America v. Heckler*, 712 F.2d 650 (D.C. Cir. 1983).

in effect or under judicial review.[26] One such statute, invalidated by the Sixth Circuit, has recently been appealed to this Court. *Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988) (No. 88-805). Although ten of these statutes are presently under court injunction for facial invalidity,[27] and five states do not enforce their stat-

26 NOTIFICATION: **Georgia:** Ga. Code Ann. § 15-11-112 (Supp. 1988); **Idaho:** Idaho Code § 18-609(6) (1987); **Illinois:** Ill. Ann. Stat. ch. 38 para. 81-64.4 (Smith-Hurd Supp. 1988); **Maryland:** Md. Health-Gen. Code Ann. § 20-103 (1987); **Minnesota:** Minn. Stat. Ann. § 144.343 subd. 2-6 (West Supp. 1989); **Montana:** Mont. Code Ann. § 50-20-107 (1987); **Nevada:** Nev. Rev. Stat. Ann. § 442.255 (Michie 1986); **Ohio:** Ohio Rev. Code Ann. § 2919.12 (Anderson 1987); **Utah:** Utah Code Ann. § 76-7-304 (1978); **West Virginia:** W. Va. Code § 16-2F-3(a) (1985). CONSENT: **Alabama:** Ala. Code § 26-21-1 to 26-21-8 (Supp. 1988); **California:** Cal. Health & Safety Code § 25958 (West Supp. 1988); **Florida:** Fla. Stat. Ann. § 390-001(4)(a) (West 1986); **Indiana:** Ind. Code Ann. § 35-1-58.5-2.5 (Burns Supp. 1988); **Kentucky:** Ky. Rev. Stat. Ann. § 311.732 (Michie Supp. 1988); **Louisiana:** La. Rev. Stat. Ann. § 40:1299-35.5 (West Supp. 1988); **Massachusetts:** Mass. Gen. Laws Ann. ch. 112, § 12S (West 1983); **Mississippi:** Miss. Code Ann. § 41-41-53 (Supp. 1988); **Missouri:** Mo. Ann. Stat. § 188.028 (Vernon Supp. 1989); **North Dakota:** N.D. Cent. Code § 14-02.1-03.1 (Supp. 1987); **Pennsylvania:** 18 Pa. Cons. Stat. Ann. § 3206 (Purdon 1983); **Rhode Island:** R.I. Gen. Laws § 23-4.7-6 (1985); **South Carolina:** S.C. Code Ann. § 44-41-30 (Law Co-op. 1985); **Tennessee:** Tenn. Code Ann. § 37-10-303 (Supp. 1988) (effective July 1, 1989).

27 ENJOINED NOTIFICATION STATUTES: **Georgia:** *Planned Parenthood Ass'n of Atlanta v. Harris*, 691 F. Supp. 1419 (N.D. Ga. 1988) (preliminary injunction); **Illinois:** *Zbaraz v. Hartigan*, 584 F. Supp. 1452 (N.D. Ill. 1984) (permanent injunction), *vacated in part and remanded*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by an equally divided Court*, ____ U.S. ____, 108 S.Ct. 479 (1987) (per curiam); **Minnesota:** *Hodgson v. Minnesota*, 648 F. Supp. 756 (D. Minn. 1986) (permanent injunction), *aff'd*, 827 F.2d 1191 (8th Cir. 1987), *vacated and withdrawn*, 835 F.2d 1545 (8th Cir. 1987) (per curiam), *petition for reh'g en banc granted*, 835 F.2d 1546 (8th Cir. 1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988) (en banc) (stay of mandate granted Oct. 7, 1988); **Nevada:** *Glick v. McKay*, 616 F. Supp. 322 (D. Nev. 1985) (preliminary injunction); **Ohio:** *Akron Center for Reproductive Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (permanent injunction), *aff'd*, 854 F.2d 852 (6th Cir. 1988), *appeal filed sub nom., Ohio v. Akron Center for Reproductive Health*, 57 U.S.L.W. 3378 (U.S. Nov. 28, 1988) (No. 88-805).

utes,[28] nine of these laws are daily affecting the lives and constitutional rights of thousands of teenagers and their families.[29]

B. It is of great public importance that this Court review the unique factual record in this case which demonstrates, for the first time, the unanticipated impact on privacy rights of compelled parental notification.

This is the first time that this Court will have the opportunity to review the constitutionality of a criminal parental notification law on a fully developed record based on five years of the law's operation. The factual findings of the district court in Minnesota, which remain undisturbed by the Eighth Circuit, contradict some of the underlying assumptions upon which this Court has relied when considering the constitutionality of requiring parental involvement in a minor's abortion decision. Indeed, Justice Stevens, in his concurring opinion in *Bellotti II*, was prophetic when predicting that "[a] real statute—rather than a mere outline of a possible statute—and a real case or controversy may well present questions that appear quite different from the hypothetical questions Mr. Justice Powell has

ENJOINED CONSENT STATUTES: **California:** *American Academy of Pediatrics, California District IX v. Van de Kamp*, No. 884574 (Cal. Sup. Ct., San Francisco Cty. Dec. 28, 1987) (preliminary injunction); **Florida:** *Jacksonville Clergy Consultation Service, Inc. v. Martinez*, 696 F. Supp. 1445 (M.D. Fla. 1988) (preliminary injunction); **Kentucky:** *Eubanks v. Collins* II, No. C82-0360-L(A) (W.D. Ky. Aug. 23, 1988) (temporary restraining order); **Mississippi:** *Barnes v. Mississippi*, No. J86-0458(w) (S.D. Miss. filed July 24, 1986) (preliminary injunction); **Pennsylvania:** *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 686 F. Supp. 1089 (E.D. Pa. 1988) (preliminary injunction).

Arizona maintains on the books a consent statute, Ariz. Rev. Stat. Ann. § 36-2152 (Supp. 1988), which was permanently enjoined in *Roe v. Collins*, No. 85-2118PHX CLH (D. Ariz. Aug. 14, 1987). This statute is no longer under judicial review.

28 Not enforced: Idaho, Montana, South Carolina and Tennessee. Maryland's statute was declared unconstitutional per opinion of the Attorney General. No. 85-035 (Dec. 31, 1985).

29 Alabama, Indiana, Louisiana, Massachusetts, Missouri, North Dakota, Rhode Island, Utah and West Virginia.

elected to address." *Bellotti v. Baird*, 443 U.S. 622, 656 n.4 (1979) (Stevens, J., concurring in the judgment) (hereinafter *Bellotti II*).

While this Court in *Bellotti II* was hopeful that a notice or consent and judicial bypass scheme would serve significant state interests, the evidence compiled in this case reveals what this Court previously could not have known: that a requirement of two-parent notice, even with a judicial bypass system, is disastrous for pregnant minors and their families. It is a matter of profound importance to minors and their families nationwide for this Court to revisit the question of the constitutionality of such laws, particularly laws with the two-parent notification requirement, on the factual record herein.

II. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH PRECEDENTS OF THIS COURT.

A. The Eighth Circuit's holding that two-parent notification is constitutional conflicts with this Court's previous rulings regarding minors' fundamental privacy rights and the integrity of families.

1. The Eighth Circuit erred in concluding that notice is less burdensome than consent.

While upholding the requirement of two-parent notice without exception in the Minnesota statute, the Eighth Circuit relies on its assumption that a notice requirement is "substantially less burdensome" than a consent requirement. (94a).[30] This assumption is in error for three reasons.

First, this Court has treated notice and consent statutes as the same for purposes of constitutional review. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 427 n. 10 (1983) (it is "parental involvement" which minors must be given an opportunity to avoid, whether that involvement means notice or consent); *Bellotti II*, 443 U.S. at 647 (stat-

30 The Eighth Circuit came to this conclusion notwithstanding its own finding that this Court held that notice and consent were the same and both required a bypass option. (81a).

ute unconstitutional because it fails, *inter alia*, to provide every minor an opportunity to "go directly to a court without first consulting or notifying her parents"); *see also Zbaraz v. Hartigan*, 763 F.2d 1532, 1539 (7th Cir. 1985), *aff'd per curiam by an equally divided court*, 108 S. Ct. 479 (1987); *Planned Parenthood of Rhode Island v. Board of Medical Review*, 598 F. Supp. 625, 634 (D.R.I. 1984) (spousal notice the same as spousal consent).

Second, notice and consent statutes are, in fact, treated as the same by minors, parents and health officials. *See, e.g.*, (119a). This is particularly true in Minnesota, where the statute requires written proof of compliance and where parents, therefore, were required to sign an acknowledgment that they were in fact notified. (2a). Further, undisputed proof at trial showed that it is the initial notice, not denied consent, that presents an obstacle to minors.[31]

Third, even assuming, *arguendo*, that consent and notice are *not* factually the same, the standard of review adopted by this Court does not distinguish between degrees of burden on a constitutional right. Because the right to choose to have an abortion is a fundamental one, the only question is whether a particular statute burdens that right, not whether it burdens it by a specific amount. *See Akron*, 462 U.S. at 419 n.1 (rejecting the dissent's use of an "undue burden" standard). The standard to be employed in the present case is, therefore, the same as in all challenges involving fundamental rights.

---

31 As this Court itself has stated: "[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents' efforts to obstruct both an abortion and their access to court." *Bellotti II*, 443 U.S. at 647 (plurality).

Indeed, a former Massachusetts judge testified in *Hodgson* that, of the 200 minors he saw pursuant to Massachusetts' parental consent statute, Mass. Gen. Laws. Ann. ch. 112, § 12S (West 1983), he could not recall one instance where the minor resorted to judicial bypass following her parents' refusal to grant consent. Instead, minors went to court to avoid the initial notice to their parents. (112a-113a).

2. The Eighth Circuit erred in concluding that a right to be involved in the medical decisions of minor offspring is inherent in every biological parent and is independent of the best interests of the minor.

Although this Court has permitted greater state regulation of a minor's right to privacy than that allowable for adults, *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the state interests recognized as sufficient to justify such regulation are specific and are not to be expanded at will by lower courts.[32] This Court has recognized that the state's predominant interest in minors is the protection of their welfare. *Bellotti II*, 443 U.S. at 635 (plurality) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971)); *H.L. v. Matheson*, 450 U.S. 388, 409 (1981). Although this Court has referred to the protection of family integrity and parental authority, *Bellotti II*, 443 U.S. at 637-39 (plurality), the latter interest has never been treated as absolute or as independent of the best interests of the minor.[33]

In upholding Minnesota's two-parent requirement, the Eighth Circuit appears to believe that a state has a significant interest in protecting *every* biological parent's involvement in his or her child's abortion decision. (89a-92a). This view conflicts with this Court's precedent for two reasons. First, by requiring that every biological parent be involved in the abortion decision, it sanctions an absent and/or non-custodial par-

---

32 In an affirmative constitutional challenge to a state statute, a law that impinges on a fundamental right is considered presumptively unconstitutional. *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *Mobile v. Bolden*, 446 U.S. 55, 76 (1980) (plurality)). Thus, even where it is a minor whose rights are infringed, the state must prove that "the statute plainly serves important state interests [and] is *narrowly drawn* to protect *only* those interests . . . ." *H.L. v. Matheson*, 450 U.S. 388, 413 (1981) (emphasis added). *Cf. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 75 (1976); *Zbaraz v. Hartigan*, 763 F.2d at 1536-37.

33 It is for this reason that even immature minors may obtain an abortion without parental knowledge if it is in *their* best interest to do so. *Bellotti II*, 443 U.S. at 647-48. This is so notwithstanding any independent right or interest of her parents.

ent's interference with the integrity of the single-parent family and the authority of the single parent.[34] As a result, single parents, like plaintiffs herein, have had to bear the burden of appearing in court, sometimes being compelled to reveal private information about their relationships with the absent parent. *See supra* note 12 and accompanying text.

Second, the parental interest discussed by the Eighth Circuit can only extend as far as is contiguous with the child's best interests. If, as the district court found, there are many parents who do not act in their children's best interests and indeed who act in a detrimental manner, *see supra* notes 10, 11, then states should not require that *all* parents be informed of their daughters' abortion decision. As noted by Justice Marshall, parental authority has been "denied legal protection when its exercise threatens the health or safety of the minor children." *Matheson*, 450 U.S. at 449 (Marshall, J., dissenting) (citing *Prince v. Massachusetts*, 321 U.S. 158, 169-70 (1944)); *see also Bellotti II*, 443 U.S. at 649 (parental involvement must be consistent with the child's best interests); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1972) (". . . the power of the parent . . . may be subject to limitation under *Prince* if it appears that parental decisions will jeopardize the health or safety of the child . . .").

A requirement that is so extensive, and so unproductive can hardly be considered "narrowly drawn" to serve a state interest. The requirement is, therefore, unconstitutional.

34 Furthermore, as noted by Chief Judge Lay in his dissent, it gives the non-custodial parent more rights than he or she may otherwise have had, since such a parent typically "loses all power with respect to [even] major decisions." (105a) (quoting Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 Yale L.J. 757, 808 (1985)).

B. The Eighth Circuit's conclusion, that the facial approval of statutes modeled on the standards set forth in *Bellotti II* mandated approval of Minnesota's law, conflicts in principle with this Court's constitutional jurisprudence.

1. The Eighth Circuit erred in failing to recognize the materiality of the district court's findings of fact to a determination on the constitutionality of Minnesota's law.

The Eighth Circuit upheld Minnesota's parental notice statute citing to this Court's opinions in *Bellotti II* and *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983). *See* (85a-86a). Noting only that "similar" laws had been upheld, and erroneously believing that this Court had previously been presented with a factual record such as the one below, the court, *sub silentio*, concluded that the actual effects of a law in operation are irrelevant to judicial review of its constitutionality. This notion is antithetical to the principles of constitutional adjudication embraced by this Court.

Resolution of conflicts between the Constitution and laws "is the very essence of judicial duty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803). A function vital to the fulfillment of this duty is the lower federal courts' capacity to act as finders of fact. The question of whether a particular statute actually burdens the plaintiff class, *see Storer v. Brown*, 415 U.S. 724, 740 (1974), or substantially serves asserted state interests, *see Plyler v. Doe*, 457 U.S. 202, 228 (1982); *Horton v. Marshall Public Schools*, 769 F.2d 1323, 1330 (8th Cir. 1985), has always been, therefore, one of fact to be determined by the district court on the record. *See also United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938); *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250, 1260 (3d Cir. 1986), *cert. denied sub nom. Township of Piscataway v. New Jersey Citizen Action*, ____ U.S. ____, 94 L.Ed.2d 186 (1987).[35]

35 Of course, where no factual record exists, or none is placed before it, this Court's decision is perforce based on the face of the statute and is

Moreover, even a law found to be valid on its face and as a matter of law may subsequently be held unconstitutional in operation based on the facts. Thus, in *Buckley v. Valeo*, 424 U.S. 1 (1976), this Court specifically held that a finding of facial validity would not preclude a future finding of invidious discrimination based on factual proof that the scheme is discriminatory in effect once in operation. *Id.* at 97 n.131. *See also Storer*, 415 U.S. at 740; *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461-62 (1945); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-97 (1926).[36]

The Eighth Circuit paid only lip service to these established principles. (85a). For instance, the court declined "to allow specific factual findings with reference to no- and one-parent households to invalidate the notice/bypass procedure . . . ." (89a-90a). In so doing, the court assumed that "the Supreme Court has considered the issues factually before the district court [in *Hodgson*] and has recognized as a *matter of law* that parental notice or consent requirements do not unconstitutionally burden a minor's rights when an appropriate judicial bypass is in place." (85a) (emphasis added) (footnote omitted). In a similar vein, the en banc opinion also stated that the "approval given to similar statutory plans [in prior Supreme Court cases] mandates approval in this case." *Id.*

---

restricted to statutory construction. Thus, in the absence of factual records in *Bellotti II*, 443 at 656 n.4 (Stevens, J., concurring in the judgment), and *Ashcroft*, 462 U.S. at 491, the parties as well as this Court treated the questions presented as pure matters of statutory construction.

36 Lower courts have also preserved this distinction. For instance, in *Elbe v. Yankton Independent School District*, 714 F.2d 848 (8th Cir. 1983), the Eighth Circuit held that "[f]acial neutrality of a particular statute is not sufficient if the statute, as construed, applied or administered violates first amendment proscriptions." *Id.* at 852. Similarly, in *New Jersey Citizen Action*, the Third Circuit held that neither factual assumptions in prior Supreme Court cases on a different issue, nor the "meager record" in a prior circuit court opinion could "be considered to have foreclosed all future litigation anywhere else . . . on this issue no matter how compelling the facts produced by the challengers" of a different though comparable ordinance. 797 F.2d at 1259-60.

The logic of these statements is plainly faulty. First, this Court could not have previously considered the factual issues before the *Hodgson* district court because the factual record developed before that court is the first and only one of its kind—all prior challenges to parental notice and consent statutes had been facial in nature. *See Matheson*, 450 U.S. at 405; *Ashcroft*, 462 U.S. at 491; *Bellotti II*, 443 U.S. at 656 n.4 (Stevens, J., concurring in the judgment). In short, because the statutes at issue in *Bellotti* and *Ashcroft* were enjoined *before* going into effect, by definition there could not have been facts before the Court on the actual impact of such laws in operation.

Second, by refusing to consider the facts that were presented, the en banc opinion ignores the importance of the fact finder's function, not only in the first instance, but also to this Court's review process. Third, by stating that the statute was constitutional as a "matter of law," the opinion vitiates this Court's distinction between facial and operational challenges.[37] Finally, by relying on this Court's findings of facial validity in "similar" statutes, the opinion ignores the differences between these statutes and the situations to which they were applied.

2. The Eighth Circuit's reliance on its own factual conclusions, notwithstanding findings of the district court to the contrary, conflicts with decisions of this Court and with Rule 52 of the Federal Rules of Civil Procedure.

The en banc opinion constructs a new theory of constitutional adjudication, one making facts irrelevant to a court's decision. *See* Section B(1), *supra*. Furthermore, wherever the court did review the factual record presented, it either misconstrued the record or *sua sponte* found a "fact" not found by the district court. Failure to abide by the Federal Rules of Civil Procedure conflicts with this Court's decisions.

Rule 52 of the Federal Rules of Civil Procedure states, "[f]indings of fact, whether based on oral or documentary evi-

---

37 *See generally*, Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655 (1988).

dence, shall not be set aside unless clearly erroneous . . . ." Fed. R. Civ. P. 52(a).[38] As this Court held in *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985),

> [t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court . . . . If the district court's account of the evidence is plausible in the light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently.

Id.

Contrary to these standards, the Eighth Circuit overruled the district court's findings in several respects. For example, the en banc opinion states that the bypass procedure "provides an effective and independent method for analyzing the situation of the individual pregnant minor." (90a). The district court found, however, that the only minors who utilized the procedure were those who were mature or "best interest" minors. *See* (23a-24a). The district court also found that although there was no systemic failure to provide a bypass proceeding in the most expeditious manner, the court bypass was so daunting that some mature minors and best interest minors did not avail themselves of the opportunity to use the procedure. (20a).

The en banc opinion also states that "[a]ny added burden the two-parent notification requirement imposes in individual cases is negated by the judicial bypass mechanism, which enables a mature or 'best interests' minor to go directly to court without consulting or notifying both parents." (93a). The district court, however, made no finding that such a "negation" occurred.[39]

38 "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

39 There is also some question as to the extent of the Eighth Circuit's belief in the existence of this negation. In its opinion it notes that

On the contrary, it found that the bypass procedure itself imposed burdens on those minors utilizing it—burdens ranging from delays in obtaining abortions to added expense to great emotional stress. It also found that the bypass mechanism imposed burdens on the single parent plaintiffs who accompanied their daughters to court in order to avoid notifying the absent parent. *See supra* note 12 and accompanying text.

3. The Eighth Circuit's determination that Minnesota's law was constitutional, without first concluding that the statute was narrowly drawn to serve a significant state interest, conflicts with this Court's prior decisions regarding the standard of review.

As noted in Section II(A), *supra*, this Court has held that laws burdening a minor's fundamental right to privacy must not only be necessary to further a significant state interest, but also must be narrowly tailored to serve that interest. *Matheson*, 450 U.S. at 413. *See Danforth*, 428 U.S. at 75 (mandatory consent provision invalid for overbroadness). Statutes that are not so "narrowly tailored" are invalid notwithstanding the presence of a state interest furthered by the law. Thus, in *Akron*, this Court held invalid a municipal ordinance, requiring all second trimester abortions to be performed in a hospital, on the basis that its scope was broader than necessary to serve the state's interest in health regulation. 462 U.S. at 438. *See also*, *Plyler*, 457 U.S. at 228.

In the present case, the Eighth Circuit did not even inquire whether the statute was narrowly tailored to serve only the state's interest in protecting the welfare of immature minors and those whose best interests would be served by consultation with their parents. Instead, the court intimated that the district court erred in "concentrating upon the impact of the statute on the pregnant minor not living with both parents, and on the mature minor or non-best interest pregnant minor" and in only

". . . the trauma of the bypass procedure, compared to its efffectiveness raise[s] considerable questions about the practical wisdom of this statute." (85a).

giving "limited consideration to the 50% or more pregnant minors who live with both parents and to pregnant minors who are immature and whose best interests may require parental involvement." (95a). The court concluded that "the statute may not be invalidated because it does not correspond perfectly in all cases to the state's asserted interests", (93a) (citation omitted), and that "[i]f there is to be any regulation . . . it must apply to all." (90a).

This conclusion is erroneous for two reasons. First, it ignores the fact that the state's asserted interest in this case can *only* be to protect immature minors whose best interest is served by parental involvement. Thus, the statute must be scrutinized as to whether it is tailored to serve *that* interest without burdening the rights of other minors. As the district court found, "Minn. Stat. § 144.343(2)-(7) imposes the substantial burden of obtaining a judicial waiver of the parental notification requirement upon a group of minors composed almost entirely of either mature minors or minors whose best interests are not served by notification." (42a).

Second, although it may be true that this Court has never demanded that a statute's fit be "perfect", it is also true that this Court nevertheless requires that a statute's fit be "reasonable." *See Akron*, 462 U.S. at 438 (statute not reasonable in light of evidence that second trimester abortions can be safely performed outside of hospitals). Allowing a margin of error of approximately 50% hardly seems reasonable in the light of the harm caused by its operation.

C. The Eighth Circuit's holding that the mandatory waiting period did not unconstitutionally burden minors' right to abortion conflicts with this Court's prior decisions as well as with the decisions of other courts.

In *Akron*, this Court invalidated a statute requiring a 24 hour waiting period after a woman gave her consent to an abortion. 462 U.S. at 450-51. In addition, nearly every court to consider a waiting period has found it unconstitutional as imposing a direct and substantial burden on women, whether adult or

minor, who seek to obtain an abortion.[40] *Zbaraz*, 763 F.2d at 1537; *American College of Obstetricians v. Thornburgh*, 737 F.2d 283, 293 (3d Cir. 1984) (parental consent and informed consent statute struck down); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 655 F.2d 848, 866 (8th Cir. 1981), *aff'd in part, rev'd in part on other grounds*, 462 U.S. 476 (1983); *Indiana Planned Parenthood v. Pearson*, 716 F.2d 1127, 1142-43 (7th Cir. 1983).

In the face of this precedent, the Eighth Circuit found that the mandatory waiting period was not unconstitutional because the state had a significant interest in "ensuring that notification results in parental involvement." (97a). This decision does not logically follow, however, from the findings made by the district court. If, as the district court found, the notice requirement fails *in fact* to further intra-family communication, it is irrational to impose a burdensome waiting period so as to permit parent-child consultation which will not *in fact* occur. As noted in Section II(B), *supra*, a statute burdening a fundamental right must further a significant state interest; if it does not, it is not constitutional.

D. The Eighth Circuit's decision that Minnesota's parental notice statute is consistent with the equal protection clause of the United States Constitution conflicts with prior decisions of this Court.

The equal protection clause of the Fourteenth Amendment directs that "all persons similarly situated . . . be treated alike." *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Statutes that "impinge on personal rights protected by the Constitution" are subject to strict scrutiny by the courts and "will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne*, 473 U.S. at 440. *See also Attorney General of New York v. Soto-Lopez*, 476 U.S. ____, 106 S.Ct.

---

40 As noted in the Statement Of The Case, *supra*, the district court found that "[d]elay of any length in performing an abortion increases the statistical risk of mortality and morbidity." (23a).

2317 (1986); *Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969).

In the case at hand, though Minnesota's law in operation clearly impinges on minors' fundamental rights,[41] the Eighth Circuit failed to subject it to the strict scrutiny required by this Court. (98a).[42] Instead, the court rejected plaintiffs' challenge under the equal protection clause based on a recitation of general precedent in the area of abortion "in other contexts", relying in particular on this Court's rejection of a challenge to a "similar" statute in *Matheson*. (98a).[43] Further, the Eighth Cir-

41 The district court found that the statute affirmatively burdens the abortion right by deterring minors who desire abortions from exercising this right. (20a). Morever, the increases in medical cost, risk and emotional trauma caused by the statute effectively punish minors for exercising their rights.

42 Indeed, the undisturbed findings of fact by the district court compel invalidation of the Minnesota statute even under heightened rational basis review. *See, e.g., Plyler*, 457 U.S. at 221, 223-24 (discrimination is not rational unless the state demonstrates that the statute "furthers some substantial goal of the State"); *Williams v. Vermont*, 472 U.S. 14, 25-28 (1985) (statute struck down under rational basis review because legislation's use of a proxy criterion, rather than legitimate governmental interest, too imprecise a classification). *See generally, Cleburne*, 473 U.S. 432, 439-50 (1985) (requirement of special use permit for home for the mentally retarded invalidated); *Hopper v. Bernalillo County Assessor*, 472 U.S. 612, 618-23 (1985) (property tax exemption for certain veterans held unlawful); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 876-83 (1985) (tax statute preferring domestic insurance companies invalidated).

43 The "other contexts" to which the Eighth Circuit refers concern the issue of funding for abortions. *See Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). Not only is that issue of minimal relevance to the case at hand, the court's reliance is misplaced for another reason. In the cases cited by the Eighth Circuit, this Court upheld the statutes in question because they placed no affirmative burden on the plaintiffs' rights; instead, the statutes merely failed to remove the obstacles that were already present. *McRae*, 448 U.S. at 316 ("although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation"); *Maher*, 432 U.S. at 474-77 & nn. 9, 10. *See also Akron*, 462 U.S. at 444 n.33 (statutes in *McRae* and *Maher* are "permissible . . . *only* because . . . [they] did not add any 'restriction on access to abortions that was not already there.' ") (citation omitted) (emphasis added). In the present case, however, the statutes created the obstacles. *See* footnote 2 and accompanying text *supra*. These distinguishable cases do not preclude a strict scrutiny of the statute at hand.

cuit addressed its conclusion exclusively to plaintiffs' claim that the statute impermissibly burdens minors who choose an abortion without imposing such burdens on those choosing to carry to term. (98a).[44]

The court's application of *H.L. v. Matheson* cannot be supported by the case itself or by basic principles of judicial review. First, the "primary" holding in *Matheson* concerned the standing of the plaintiff therein. *Akron*, 462 U.S. at 441 n.30. The part of the decision on which the Eighth Circuit relies concerned *only* the facial constitutionality of a statute directed at immature, unemancipated minors living with and dependent on their parents. *Matheson*, 450 U.S. at 407. Second, no factual record was present in *Matheson*; this Court therefore had no opportunity to review the effects of the statute on different classes of minors. Despite the existence of a factual record in this case, however, the Eighth Circuit does not cite to it even once in its dismissal of plaintiffs' equal protection claim. Third, *Matheson* itself relies on the conclusion that the medical deci-

44 The Eighth Circuit rejected, without analysis, plaintiffs' challenge to the statute's impermissible discrimination between those minors who can notify both parents and those who cannot. In so doing, the court stated that plaintiffs had not raised the claim at trial. (98a). Plaintiffs are entitled to the relief supported by the facts. *See, e.g., Schumann v. Levi*, 728 F.2d 1141, 1143 (8th Cir. 1984) (trial court must grant relief to which party is entitled); *Charles Schmitt & Co. v. Barrett*, 670 F.2d 802, 806 (8th Cir. 1982) (final judgment shall grant relief to which prevailing party is entitled) (citations omitted); *U.S. v. Marin*, 651 F.2d 24, 30-31 (1st Cir. 1981) (court must grant whatever relief is appropriate in case on facts proved). Plaintiffs pled and raised their claims under the equal protection clause, *Hodgson v. Minnesota*, No. 3-81 Civ. 538 (D. Minn. Jan. 23, 1985), and the facts at trial demonstrate without doubt that minors from different family settings are differentially and irrationally burdened by the Minnesota law. (21a-22a; 29a-31a; 43a-44a). Where a claim for relief under the equal protection clause has been stated and briefed and the facts demonstrate an irrational legislative classification, substantial injustice would result from a peremptory refusal to consider plaintiffs' claim. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (exception to general rule where "injustice might otherwise result") (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

sions surrounding the abortion decision are graver than the decisions surrounding childbirth. *Matheson*, 470 U.S. at 411-13. This conclusion, made in the absence of a factual record, is irrational in the light of the evidence presented to, and ignored by, the Eighth Circuit.[45]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

January 5, 1989

/s/ JANET BENSHOOF

WILLIAM Z. PENTELOVITCH
BECKY PALMER
CHARLES HOFFMAN
Maslon, Edelman, Borman & Brand
1800 Midwest Plaza
Minneapolis, MN 55402
(612) 339-8015

JANET BENSHOOF
RACHAEL PINE
LYNN PALTROW
American Civil Liberties Union Foundation
132 West 43rd Street
New York, NY 10036
(212) 944-9800

LINDA OJALA
Kurzman, Grant & Ojala
2445 Park Avenue South
Minneapolis, MN 55404
(612) 871-9004

45 The evidence presented in this case shows that abortions are much safer than childbirth. Between 1976 and 1978, women in the United States were ten times more likely to die from childbirth than from a legal abortion. LeBolt, Grimes & Cates, *Mortality From Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188, 190 (1982). Since 1978, abortions have become even safer. *Id.* Teenagers, particularly younger teenagers, have a higher risk of death from continued pregnancy or childbirth than adult women. (144a-145a). Teenagers also have a higher risk of morbidity, i.e. major complication, from childbirth than adult women. (141a-142a). The psychological sequelae, both negative and positive, of an abortion decision bear similar results. For instance, a young woman who obtains an abortion is less likely to suffer negative outcomes than a young woman who carries to term. (138a). Further, the outlook for children of women who are denied abortions is more negative than for children of women who are not. (139a-140a).